G. CHOUDHURY v. PUBLIC PROSECUTOR

[A.Cr.J. (Rajah J.) March 10, 1980]

[Singapore — Magistrate's Appeal Nos. 112 & 112A of 1978]

Company Law — Insider trading — Director charged under ss. 132A(8), 135(9), 135A(2) and 364A, Companies Act (Cap. 185) — Validity of charge under section 132A(8) in issue — Securities Industry Act, 1970, s. 75A.

Company Law — Scope of section 132A — "facing a financial crisis" — "specific information" — Meaning of — Companies Act (Cap. 185), s. 132A — Securities Industry Act, 1970, s. 75A.

The appellant in this case was tried on 112 charges under the Companies Act (Cap. 185) in the lower court between June 19, 1978 and July 25, 1978. He pleaded guilty to all charges except the first eight charges. The trial proceeded on the said eight charges. At the conclusion of the hearing on August 2, 1978, the accused was acquitted on charge No. 8 but convicted and sentenced on the first 7 charges. The accused appealed against them.

The first six charges were framed under section 132A, that he, on or about the 13th day of January 1976, in Singapore, being the Chairman of the Board of Directors of Ben & Co. Ltd. in relation to dealings in the shares of the said company by himself, to wit, the sale, of 125,000 shares, made use to gain an advantage for himself of specific confidential information that Ben & Co. Ltd. was facing a financial crisis, which information he acquired by virtue of his position as an officer of Ben & Co. Ltd. and which information if generally known might reasonably be expected to affect materially the prices of the shares he was selling on the Stock Exchange, and he had thereby committed an offence punishable under section 132A(8) of the Companies Act (Cap. 185).

Counsel for the appellant contended that the phrase "facing a financial crisis" was not "specific information" within the meaning of section 132A.

Held, allowing the appeal on the first six charges: (1) whether a company is facing a financial crisis is a matter of opinion which one deduces after having looked at matters relating to the finances of a company, its management and the support it receives from its bankers. The phrase "facing a financial crisis" is a subjective statement and not an objective one, precisely or unequivocally expressed;

(2) "specific information" to which the section reters must have an existence of its own quite apart from the operation of any process of deduction. The "specific information" must be capable of being pointed to and identified, and must be capable of being expressed unequivocally.

Held, dismissing the appeal against conviction on the 7th charge: the sentence of 6 months' imprisonment was set aside and a fine of $4,000 was imposed instead.

[Editorial Note: The following questions of law were reserved for the Court of Appeal: (1) whether in alleging that the accused had been dealing in the securities ot Ben & Co. Ltd. by himself by disposing of 360,000 shares in a number of transactions and making use of confidential information that the Company was facing a financial crisis, he can be described as having acted upon "specific confidential information" thereby committing a breach of the provisions of section 132A(1), Companies Act (Cap. 185) and (2) whether in law the said charges Nos. 1 to 6 disclosed offences under the said section 132A and punishable under section 132A(8) of the said Act.

The Court of Appeal (on October 30, 1980) answered in the affirmative for both questions reserved.]

Cases referred to:-

(1) *Chaloner* v. *Bolckow* (1877-8) L.R. 3 App. Cas. 933.

(2) *Ryan* v. *Triguboff* 1 A.C.L.R. (1974-76) 337.

MAGISTRATE'S APPEAL.

J. Newey Q.C. (*N. Ganesan* with him) for the appellant.

Sowaran Singh (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Rajah J.: The appellant was tried in the 9th District Court on 112 charges, under the Companies Act (Cap. 185) between June 19, 1978 and July 25, 1978.

The first 6 charges were under section 132A(8) (The 1st charge is set out in *Annex A*), the 7th and 8th charges under section 364A, the 9th to the 60th charges under section 135(9) and the 61st to the 112th charges under section 135A(2).

On June 30, 1978, the accused pleaded guilty firstly to charge No. 55, as representing all charges numbered 9 to 61 and agreed that the other charges under section 135(9) in this class be taken into consideration, and secondly, to charge No. 107, as representing all charges numbered 62 to 112 and also agreed that the other charges under section 135A(2) in this class be taken into consideration.

Thereafter the trial proceeded on charges 1 to 8, and at the conclusion of the hearing on August 2, 1978 the accused was acquitted on charge No. 8 but convicted on the first 7 charges and was sentenced as follows: —

(a) 9 months' imprisonment on each of the first six charges;

(b) 6 months' imprisonment on the 7th charge;

(c) 6 months' imprisonment on the 55th charge having taken into consideration charges numbered 9 to 60; and

(d) 6 months' imprisonment on the 107th charge, having taken into consideration charges numbered 61 to 112,

the sentences to run concurrently.

The appellant being dissatisfied with the convictions on the first seven charges and the sentences imposed has appealed both as to conviction and sentence.

Counsel for the appellant, Mr. Newey, opened his appeal by challenging the validity of the first six charges, which were framed under section 132A, which is at *Annex 1*. He submitted that each of these charges, as framed, disclosed no offence under section 132A(8). Briefly, his contention was that the phrase "facing a financial crisis" is not "specific information" within the meaning of section 132A. Counsel for the accused, Mr. David Marshall, at the District Court trial also raised as a preliminary point, the same objection, but was overruled by the learned trial judge.

Having cited to me the case of *Chaloner* v. *Bolckow*(1) wherein it is stated that the words "specific is ordinarily used in the common parlance of language as meaning distinct from general; ..." (bottom of page 938), Mr. Newey went on to say that for information to be specific it had to be distinct, explicit, precise, exact, definite and unequivocal as opposed to information of a general nature and that the phrase "facing a financial crisis" connotes something much too general in nature and depends for its meaning on the opinion and judgment of an individual and is not sufficiently distinct, precise, exact, definite or unequivocal to bring it within the meaning of the phrase "specific information".

Popular speech does not, nor has it given the phrase "facing a financial crisis" any sure guide as to the limits of what is meant by it or of the conditions or circumstances in which a financial crisis occurs. It varies from person to person, partnership to partnership and company to company. The Companies Act does not define financial crisis nor are accountants agreed in all cases as to what ingredients must necessarily be present to constitute a financial crisis. One has only to look at the evidence of the two accountants who gave evidence in this case, one for the prosecution and the other for the defence, to see how different their views are on this question. What is more, there seems to be no judicial definition of this phrase and, if there is, it has not been cited to me.

In my view whether a company is facing a financial crisis is a matter of opinion which one deduces after having looked at matters relating to the finances of a company, its management and the support it receives from its bankers. What might strike one as constituting a financial crisis need not strike another in the same way. In other words this is a matter of opinion or of judgment. The phrase "facing a financial crisis" is a subjective statement and not an objective one, precisely or unequivocally expressed.

Counsel cited and relied on the Australian case of *Ryan* v. *Triguboff*.[2]

In this Australian case, Triguboff was a director of Kimberley Mineral Holdings Ltd. (Kimberley) and Meriton Properties Ltd. (Meriton), the latter being the largest single shareholder of Kimberley. Triguboff learned from his position with Kimberley that a West Australian company, Dominance N.L., was prepared to purchase a large parcel of shares in Kimberley. A transaction was then put through whereby control in Kimberley was bought by Dominance N.L. to the profit of Triguboff, his fellow directors and Meriton. Triguboff was charged before a Magistrate under section 75A of the Securities Industry Act, 1970 (*Annex 2*) for taking advantage of specific information known to him as an officer of Kimberley, but not generally known, to deal in securities of Kimberley. The Magistrate convicted Triguboff and he appealed to the Supreme Court. Held, *inter alia,*

(1) To be "specific information" within the meaning of section 75A of the Securities Industry Act, 1970, matter must not merely be precisely definable but also its entire content must be precisely and unequivocably expressed and discerned.

(2) Knowledge that Dominance N.L. was prepared to purchase shares in Kimberley was not knowledge of specific information.

After having set out the facts of the case and the findings of the learned Magistrate, the learned judge said this: —

"With those findings of fact in mind, let me now make some general observations on the section. It firstly requires that the defendant should 'through his association with' the company, in this case, through his being a director, have knowledge of specific information relating to the company or its securities. The information which he has thus acquired must not be generally known but must be of such a nature that if it were generally known it might reasonably be expected to affect materially the market price of the shares. The section then contemplates that the director having, through his office, acquired knowledge of the kind just referred to, puts that knowledge to use for the purpose of advantage to himself by some dealing with the securities of the company. What then is meant by the expression 'specific information relating to the corporation or body or to the securities issued'? Bearing in mind that the clear purpose of the section is to penalise directors (and others were are associated with a company as set out in sub-section (6)) who seek to make a profit from the use of information which they gain in their capacity as director by some dealing in the company's securities, there appears to be no reason to confine the nature of the 'information' or the words 'relating to' in any way, provided it can be seen that the information does relate to the corporation or its securities and does have the other characteristics which the section calls for. 'Specific information', in my view, connotes not merely that it is precisely definable but that its entire content can be precisely and unequivocally expressed and discerned.

As I have already set out, the magistrate's finding as to the 'specific information' of which the defendant had knowledge was "that Dominance N.L. was prepared to purchase a large parcel of shares in Kimberley being 44% of all issued shares so as to give effective control of the company at a price of 10 cents per share at a time when they were being quoted on the Stock Exchange at 4 cents per share'. What exactly was meant by the expression 'that Dominance N.L. was prepared to purchase'? Now it is quite obvious that the statement is a conclusion drawn from other facts, and this accordingly requires an analysis of the steps by which the conclusion is arrived at. If what the magistrate expressed in his finding is 'specific information', then it ought to be possible to discern with accuracy how and when the defendant came to have knowledge of it. What then was the extent of the defendant's knowledge in, say, the initial discussions with Mr. Trousdale, Mr. McEwan, Mr. Harding and Mrs. Kent? (the last three named of whom I shall treat as the representatives of Dominance N.L.). He had direct knowledge of the discussions because he was involved in them. Those discussions, as the evidence showed, were in respect of specific details of the transaction in which the representatives of Dominance N.L. and the defendant were both interested. As the transaction undoubtedly concerned the shares in Kimberley, it could fairly and accurately be said that he had knowledge of the specific details of negotiations going on in respect of a sale of certain of the shares in Kimberley by him and his co-directors. Now quite obviously the fact that the defendant and his co-directors, being persons who wished to sell their shares, were discussing sale with representatives of Dominance N.L. could lead to a conclusion by the defendant, or anyone else knowing those facts at that time, that Dominance N.L. — through the persons representing it — was 'interested' in the purchase of the shares of the defendant and his co-directors or 'was indicating a willingness' to purchase them, or 'was prepared to negotiate' to buy them, or 'might buy them' — no doubt other expressions can be thought of — but these are merely loose descriptions which can be applied to the apparent state or attitude of mind to the proposed transaction of those acting for Dominance N.L., arising from the fact that they were participating in the negotiations. In other words, the specific detail of the matters under discussion and the fact that Dominance N.L. through its representatives, was participating in those discussions, gives rise at the time to some general conclusions. At any given time from the commencement of the negotiations the defendant's 'knowledge' if expressed at that time would be: 'I know that Dominance N.L. is 'interested in purchasing' or prepared to purchase' (or however else one likes to describe it) my shares and my co-directors' shares on the terms we are discussing because it is negotiating with me'. Objectively, at that time, one would say that the defendant 'has' such 'knowledge'. Now what has been done here, in order to be able to point to 'specific information' and be able to claim that the defendant had knowledge of it, is to allege as a fact a loose description of a state of mind or attitude of mind of Dominance N.L. (I will assume a soulless corporation can have a state of mind) in relation to what is thought to be a suitable summary of the substantial facts of the transaction then under discussion, and which Dominance N.L. in fact subsequently entered into. There thus comes into existence — as a fact it appears to be assumed — 'the fact that Dominance N.L. was prepared to purchase a large parcel of shares in Kimberley being 44% of all issued shares so as to give effective control of the company at a price of

10 cents per share at a time when they were being quoted on the Stock Exchange at 4 cents per share'. *In my view, the deduction so made cannot be held to be within the expression 'specific information' in the section. The 'specific information' to which the section refers must have an existence of its own quite apart from the operation of any process of deduction, such as has been employed here. The 'specific information' must be capable of being pointed to and identified, and must be capable of being expressed unequivocally.*"

I respectfully agree with the judgment of Lee J. which I adopt.

I accepted counsel's submission on this preliminary issue and held that the first six charges as framed were invalid. The appeal on the first six charges were allowed and the convictions thereon were quashed.

There were two other points on which Mr. Newey made submissions: —

(i) that on the particular facts of this case, it was the bank, who had advanced money to Ben & Co. Ltd. on the security of these shares, that had dealt with the shares and not the appellant;

(ii) that as the monies realised on the sale of these shares were utilised by the bank in the reduction of the overdraft account, it was the bank that had gained an advantage and not the appellant.

In the view I took of the validity of the first six charges I did not have to pronounce on these two points. If I had taken the view that the charges were in order I would have allowed the appeal on these two additional grounds, that is to say that the appellant did not deal with these shares and did not gain any advantage from the sale of the shares.

The appeal against conviction on the 7th charge was dismissed, but the sentence of 6 months' imprisonment was set aside and a fine of $4,000 was imposed instead.

Order accordingly.

ANNEX A

1st Charge (DCA 286/78)

That he, on or about the 13th day of January 1976, in Singapore, being the Chairman of the Board of Directors of Ben & Co. Ltd. in relation to dealings in the shares of the said Company by himself, to wit, the sale of 125,000 shares (Contract Nos. A 56250Y (SK) and A 56249Y (SK)), made use to gain an advantage for himself, of specific confidential information that Ben & Co. Ltd. was facing a financial crisis, which information he acquired by virtue of his position as an officer of Ben & Co. Ltd. and which information if generally known might reasonably be expected to affect materially the prices of the shares he was selling on the Stock Exchange, and he had thereby committed an offence punishable under section 132A(8) of the Companies Act (Cap. 185).

ANNEX 1

Section 132A of the Companies Act, Cap. 185:

132A. — (1) An officer, agent or employee of a corporation who in or in relation to a dealing in securities of the corporation by himself or any other person makes use to gain, directly or indirectly, an advantage for himself or any other person of specific confidential information acquired by virtue of his position as such officer, agent or employee which if generally known might reasonably be expected to affect materially the price of the subject-matter of the dealing on a stock exchange shall, in addition to any penalty imposed under subsection (8), be liable to a person for loss suffered by that person by reason of the payment by him or to him of a consideration in respect of the securities greater or lesser, as the case may be, than the consideration that would have been reasonable if the information had been generally known at the time of the dealing.

(2) An officer, agent or employee of a corporation is not liable under subsection (1) to a person for any loss suffered by that person if that person knew or ought reasonably to have known of the information referred to in subsection (1) before entering into the transaction relating to the dealing in securities of the corporation.

(3) An action for the recovery of the amount of a loss referred to in subsection (1) shall not be commenced after the expiration of two years after the date of the completion of the dealing in securities in respect of which the loss was suffered.

(4) In this section —

"agent" includes a banker, solicitor, auditor, accountant or stockbroker of the corporation and any person who at any time within the preceding twelve months had been a banker, solicitor, auditor, accountant or stockbroker of the corporation;

"corporation" includes a corporation that is related to a corporation under section 6;

"dealing in securities in relation to a corporation" means a transaction relating to —

(a) shares in, debentures of, or interests within the meaning of section 84 made available by the corporation or by a related corporation; or

(b) rights or options in respect of the acquisition or disposal of such debentures or interests;

"officer" includes a person who at any time within the preceding twelve months was a director of the corporation.

(5) This section shall be extended to apply to an officer, agent or employee of a corporation who makes use to gain, directly or indirectly, an advantage for himself or any other person, of specific confidential information acquired by virtue of his position as such officer, agent or employee, regarding —

(a) the possibility of a take-over offer or bid being made to another corporation by the corporation to which he belongs; or

(b) the possibility of his corporation entering into a substantial commercial transaction with another corporation,

to deal in the securities of that corporation in the expectation that, if this information becomes generally known, the price of the securities of that other corporation on a stock exchange might be materially affected.

(6) A committee of a stock exchange which has been approved by the Minister pursuant to the provisions of any written law relating to the securities industry or any body, panel or council set up to advise the Minister on the securities industry may, and shall if so directed by the Minister, investigate any dealing in securities under this section and may in any such investigation summon any person to give evidence on oath or affirmation or produce any document or material necessary for the purpose of the investigation.

(7) The Minister may, for the protection of investors, by regulation restrict dealings either directly or indirectly in the securities of a corporation by an officer, agent or employee of the corporation in certain specified circumstances or during certain periods of a financial year of a corporation when such officer, agent or employee is, or is likely to be, in possession of special confidential information acquired in his capacity as an officer, agent or employee of the corporation and which if generally known might reasonably be expected to affect materially the price of the securities of that corporation on a stock exchange.

(8) An officer, agent or employee of a corporation who commits a breach of the provisions of this section shall be guilty of an offence under this Act and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding thirty thousand dollars or to both such imprisonment and fine.

ANNEX 2

Section 75A of the Securities Industry Act, 1970:

"Insider Trading

(1) Where, through his association with a corporation or body, a person has knowledge of specific information relating to the corporation or body or to securities issued or made available by the corporation or body and that information is

not generally known but, if generally known, might reasonably be expected to affect materially the market price of those securities, he is guilty of an offence against this Act, if he —

(a) deals, directly or indirectly, in those securities for the purpose of gaining an advantage for himself by the use of that information, or

(b) divulges that information for the purpose of enabling another person to gain an advantage by using that information to deal, directly or indirectly, in those securities.

Penalty: Two thousand dollars.

(2) Where an offence under sub-section one of this section is committed and an advantage referred to in that sub-section is gained from a dealing in securities to which the offence relates, any person who gained that advantage is, whether or not any person has been prosecuted for or convicted of that offence —

(a) liable to another person for amount of any loss incurred by that other person by reason of the gaining of that advantage; or

(b) liable to the corporation or body that issued or made available those securities for any profit that accrued to himself by reason of the gaining of that advantage.

(3) Where a loss or profit referred to in sub-section two of this section is incurred by reason of an advantage gained from a dealing in securities, the amount of the loss or profit is the difference between —

(a) the price at which the dealing was effected; and

(b) the price that, in the opinion of the court before which it is sought to recover the amount of the loss or profit, would have been the market price of the securities at the time of the dealing if the specific information used to gain that advantage had been generally known at that time.

(4) The Commission may, if it considers it to be in the public interest to do, bring an action in the name of and for the benefit of a corporation or other body or person for recovery of a loss or profit referred to in sub-section two of this section.

(5) An action to recover a loss or profit referred to in sub-section two of this section may not be brought after —

(a) the expiration of the period of two years next succeeding the dealing in securities to which the action relates; or

(b) the expiration of the period of six months next succeeding the discovery of the relevant facts by the person who suffered the loss or seeks to recover the profit,

whichever occurs first.

(6) For the purposes of sub-section one of this section, a person is associated with a corporation or other body —

(a) if, in the case of a corporation, he is an officer of the corporation or of a related corporation within the meaning of the Companies Act 1961;

(b) if, in the case of a body other than a corporation, he bears to that body a relationship analogous to the relationship borne to a corporation by an officer of the corporation;

(c) if he acts, or has acted, as banker, solicitor, auditor or professional adviser, or in any other capacity for the corporation or body;

(d) if he has a beneficial interest in one or more shares in the corporation or body and the nominal amount of that share, or the aggregate of the nominal amounts of those shares is not less than one tenth of the aggregate of the nominal amounts of all the issued shares of the corporation or body;

(e) where the person so associated by virtue of paragraph (c) or (d) of this sub-section is a corporation, if he is a director, manager or secretary of that corporation."

Appeal dismissed.

Solicitors: *Ganesan & Co.*

MALAYSIAN REPORTS

TENGKU MARIAH BINTE SULTAN SULAIMAN v. HALIMAH BINTE ABDULLAH

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman & Salleh Abas F.JJ.) June 12, 1979]

[Kota Bharu — Federal Court Civil Appeal No. 55 of 1979]

Practice and Procedure — Limitation — Sale of land — Claim for land to be transferred — Acknowledgement after expiry of period of limitation — Respondent in possession of premises — Equity.

In this case the respondent brought an action for an order that the appellant execute a transfer of the title of a piece of land which the respondent claimed had been sold to her. The appellant's defence was that the action was time barred as it was commenced more than twelve years after the title was registered in the appellant's name. The previous solicitors of the appellant had written to the respondent that the appellant was prepared to sign a transfer of the land into the name of the respondent. The learned trial judge held that the letter of the solicitors for the appellant was a sufficient acknowledgement and therefore the respondent's claim was not statute-barred — See [1980] 1 M.L.J. 240. The appellant appealed.

Held: (1) as the facts showed that the respondent was in possession of the land and had built two or three houses on it, she was the equitable owner of the land and so long as she was in possession of the land she did not lose her rights simply by not proceeding at once for specific performance;

(2) in the circumstances it was unnecessary to consider whether an acknowledgement made after the expiry of the period of limitation could revive the period of limitation.

Cases referred to:-

(1) *Munah* v. *Fatimah* [1968] 1 M.L.J. 54, 55.

(2) *Kersah La' Usin* v. *Sikin Menan* [1966] 2 M.L.J. 20.

(3) *Williams* v. *Greatrex* [1957] 1 W.L.R. 31.

(4) *Othman & Anor.* v. *Mek* [1972] 2 M.L.J. 158.

FEDERAL COURT.

Mrs. Cecilia Fernandez for the appellant.

Wan Abdul Muttalib for the respondent.

Cur. Adv. Vult.

Syed Othman F.J. (delivering the judgment of the Court): At the hearing in Kota Bharu we dismissed this appeal with costs to the respondent.

On the only point to be determined in this appeal we found that the respondents' action for an order that the appellant execute a transfer of the title to a piece of land which the appellant had sold to the respondent was not time-barred under the Limitation Ordinance.

These are our reasons:

At the trial both sides relied on the pleadings. The facts as averred in the pleadings were not disputed. In 1951 the respondent paid the appellant $450 for the land. In the deed of sale entered into, the appellant agreed to execute a valid transfer of the land immediately on the land being registered in the appellant's name; the land had been so registered; in 1977 the respondent caveated the land; in 1978 in reply to the respondent's letter requesting transfer of the title, the appellant, through her solicitor, admitted that she was willing to sign any document of transfer; the respondent prepared a document of transfer and sent it to the appellant's solicitor; there was no reply; two